

1 WO

2
3
4
5
6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Manuel de Jesus Ortega Melendres, on
10 behalf of himself and all others similarly
11 situated; et al.

12 Plaintiffs,

13 and

14 United States of America,

15 Plaintiff-Intervenor,

16 v.

17 Joseph M. Arpaio, in his official capacity as
18 Sheriff of Maricopa County, Arizona; et al.

19 Defendants.

No. CV-07-2513-PHX-GMS

ORDER RE CRIMINAL CONTEMPT

20 This Order is entered pursuant to 18 U.S.C. § 401 and Rule 42 of the Federal
21 Rules of Criminal Procedure.

22 For the reasons set forth below, the Court refers Sheriff Joseph M. Arpaio to
23 another Judge of this Court, to be randomly selected by the Clerk's office, for a
24 determination of whether he should be held in criminal contempt for: (1) the violation of
25 this Court's preliminary injunction of December 23, 2011; (2) failing to disclose all
26 materials that related to the Montgomery investigation in violation of: (a) this Court's
27 specific order entered orally on April 23, 2015 (Doc. 1027 at Tr. 625–60), and (b) this
28 Court's orders to comply with the Monitor's requests for documents including the
Monitor's follow-up ITR (investigative team requests) for this material, (Doc. 606 ¶ 145;

1 Doc. 700 at Tr. 71–73; Doc. 795 at 20); and/or (3) his intentional failure to comply with
2 this Court’s order entered orally on April 23, 2015 that he personally direct the
3 preservation and production of the Montgomery records to the Monitor, (Doc. 1027 at Tr.
4 625–60).

5 Chief Deputy Sheridan is likewise referred to the same Judge for a determination
6 of whether he should be held in criminal contempt for: (1) concealing from the Monitor,
7 the parties, and this Court, the existence of the 1459 IDs and the related PSB
8 investigation into them in violation of this Court’s orders of October 2, 2013, (Doc. 606
9 ¶¶ 145–47), May 14, 2014, (Doc. 700 at Tr. 71–77), November 20, 2014, (Doc. 795 at
10 16–21), December 9, 2014, (Doc. 825 at 2), and February 12, 2015, (Doc. 881 at 2); and
11 (2) intentionally withholding the 50 Montgomery hard drives from production to the
12 Court, (Doc. 1027 at Tr. 625–60).

13 Captain Bailey is also referred to the same Judge for a determination of whether he
14 should be held in criminal contempt for concealing from the Monitor, the parties, and this
15 Court the existence of the 1459 IDs and the related PSB investigation into them in
16 violation of this Court’s orders of October 2, 2013, (Doc. 606 ¶ 145), May 14, 2014,
17 (Doc. 700 at Tr. 71–73), November 20, 2014, (Doc. 795 at 16–21), December 9, 2014,
18 (Doc. 825 at 2), and February 12, 2015, (Doc. 881 at 2).

19 Michele Iafrate is likewise referred to the same Judge for a determination of
20 whether she should be held in criminal contempt for concealing from the Monitor, the
21 parties, and this Court the existence of the 1459 IDs and the related PSB investigation
22 into them, and her instructions to her client to misstate facts as to the IDs in violation of
23 this Court’s orders of October 2, 2013, (Doc. 606 ¶ 145), May 14, 2014, (Doc. 700 at Tr.
24 71–73), November 20, 2014, (Doc. 795 at 16–21), December 9, 2014, (Doc. 825 at 2),
25 and February 12, 2015, (Doc. 881 at 2).

26 To the extent that Chief Deputy Sheridan and/or Captain Bailey may have
27 committed other contemptuous acts, the Court determines either that the remedies
28 imposed in the civil contempt order will adequately serve the purposes of this Court or

1 that referral of the matter to other agencies will provide the most appropriate resolution to
2 the matter.

3 The Court has further determined, for the reasons set forth below, that it is not
4 appropriate to prosecute as criminal contempt the multiple intentional false statements
5 made by Sheriff Arpaio and Chief Deputy Sheridan. The United States Attorney is
6 presumably already aware of this Court's findings of fact with respect to Sheriff Arpaio
7 and Chief Deputy Sheridan's untruthful testimony. Whether any resulting criminal
8 prosecutions are merited is a matter appropriately left to the discretion of the Department
9 of Justice.

10 I. ANALYSIS

11 Criminal contempt serves to vindicate the Court's authority by punishing the
12 intentional disregard of that authority. *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110
13 (9th Cir. 2005) (citation omitted); *United States v. Asay*, 614 F.2d 655, 659 (9th Cir.
14 1980). Non-parties can be prosecuted for criminal contempt if they are under a parties'
15 control and have actual notice and knowledge of and are bound by the Orders that have
16 been violated. *United States v. Baker*, 641 F.2d 1314, 1314–15 (9th Cir. 1981). If
17 appropriate, a court can impose both criminal and civil contempt on the same party for
18 the same conduct. *United States v. Rose*, 806 F.2d 931, 933 (9thCir. 1986). Generally,
19 however, a trial court should do so only if the civil remedy is deemed inadequate.¹ *Young*
20 *v. U.S. ex rel. Vuiton et Fils S.A.*, 481 U.S. 787, 801 (1987).

21 The need for a criminal contempt order must be considered in the context of each
22 case, taking into account such matters as the surrounding controversy, prior warnings
23 from the trial judge, and the conduct of the contemnor. *See Hawk v. Al Cardoza*, 575
24 F.2d 732, 735 (9thCir. 1978). To impose criminal contempt on a party for the violation
25 of a court order, the order must be clear and definite and the contemnor must willfully
26 disobey it. *See Rose*, 806 F.2d at 933.

27
28 ¹ The Court does not suggest whether this prosecution should be charged as the
equivalent of a misdemeanor or a felony offence.

1 **A. Sheriff Joseph M. Arpaio**

2 **1. Violation of this Court's December 2011 Preliminary Injunction**

3 Based on the extensive testimony set forth at the hearing, the Court has already
4 concluded under the civil standard of proof that Sheriff Arpaio knew of the December
5 2011 preliminary injunction and intentionally disobeyed it. (*See* Doc. 1677 ¶¶ 1–65.)

6 In brief summary, in December 2011, still well prior to trial, this Court entered a
7 preliminary injunction prohibiting the Defendants from enforcing federal civil
8 immigration law or from detaining persons they believed to be in the country without
9 authorization but against whom they had no state charges. It also ordered that the mere
10 fact that someone was in the country without authorization did not provide, without more
11 facts, reasonable suspicion or probable cause to believe that such a person had violated
12 state law.

13 Sheriff Arpaio admitted that he knew about the preliminary injunction upon its
14 issuance and thereafter. (*Id.* ¶ 15.) Sheriff Arpaio's attorney stated to the press that the
15 Sheriff disagreed with the Order and would appeal it, but would also comply with it in
16 the meantime. (*Id.* ¶ 14.) Sheriff Arpaio's attorney and members of his command staff
17 repeatedly advised him on what was necessary to comply with the Order. However, the
18 Court found that Sheriff Arpaio intentionally did nothing to implement that Order. (*Id.*
19 ¶ 65.) The MCSO continued to stop and detain persons based on factors including their
20 race, (*id.* at ¶ 161), and frequently arrested and delivered such persons to ICE when there
21 were no state charges to bring against them, (*id.* ¶¶ 157–61). Sheriff Arpaio did so based
22 on the notoriety he received for, and the campaign donations he received because of, his
23 immigration enforcement activity. (*Id.* ¶¶ 58–60.)

24 Since Sheriff Arpaio had previously taken some of his arrestees to the Border
25 Patrol when ICE refused to take them, he determined that referral to the Border Patrol
26 would serve as his “back-up” plan for all similar circumstances going forward. (*Id.*
27 ¶¶ 40–41.) Sheriff Arpaio's failure to comply with the preliminary injunction continued
28 even after the Sheriff's appeal to the Ninth Circuit Court of Appeals was denied months

1 later. (*Id.* ¶¶ 42–44.) When Plaintiffs accused Sheriff Arpaio of violating the Order, he
 2 falsely told his lawyers that he had been directed by federal agencies to turn over persons
 3 whom he had stopped but for whom he had no state charges. (*Id.* ¶¶ 50–52.)
 4 Nevertheless, Sheriff Arpaio’s lawyer still advised him that he was likely operating in
 5 violation of the preliminary injunction. (*Id.* ¶ 53.) Although Sheriff Arpaio told counsel
 6 on multiple occasions either that the MCSO was operating in compliance with the Order,
 7 or that he would revise his practices so that the MCSO was operating in compliance with
 8 the Order, he continued to direct his deputies to arrest and deliver unauthorized persons
 9 to ICE or the Border Patrol. (*Id.* ¶¶ 55–57.)

10 It has not been possible for the MCSO to track the number of persons who were
 11 stopped or arrested because of Sheriff Arpaio’s violation of this Order over the ensuing
 12 17-months that it was ignored. (*See id.* ¶¶ 157–63.)

13 **2. Failure to Produce the Montgomery Material**

14 Throughout this case, the Court has reminded Sheriff Arpaio that he is the party to
 15 this lawsuit, not his subordinates, and thus the failure of his subordinates to carry out this
 16 Court’s orders would amount to his own failure to do so. (*See* Doc. 700 at Tr. 71–73;
 17 Doc. 1027 at Tr. 632.) When Sheriff Arpaio gave his April 23, 2015 testimony on the
 18 Montgomery investigation, he testified that the MCSO possessed some documents and
 19 materials pertaining to it. To assign personal responsibility for the preservation and
 20 production of such materials, including all electronic data, the Court ordered the Sheriff
 21 to personally take charge of preserving, retrieving and disclosing the documents.

22
 23 THE COURT: . . . I want you to direct your people to put a hold on it
 24 immediately and preserve it. And that includes any documentation or
 25 numbers that would relate to Mr. Montgomery’s confidential status. You
 understand that?

26 [ARPAIO]: Your Honor, are you referring to this investigation with the
 monitors and ---

27 THE COURT: No, no. I’m referring to the investigation that Mr.
 28 Montgomery was undertaking with Mr. Mackiewicz, Mr. Anglin, Mr.
 Zullo, anybody else from your staff, anybody else from the MCSO, or
 anyone else from the posse. I want all records that in any way relate to it,

1 all electronic data or anything else, or the financing, funding of that
2 operation, all phone records, e-mails, reports, I want it all preserved. And I
3 think I will send the monitor to begin taking possession of those records
4 and we'll do it confidentially, imminently. But I don't want in the interim
5 any of those records lost inadvertently or otherwise. You understand what
6 I'm saying?

7 [ARPAIO]: Yes.

8 THE COURT: And you'll so direct your people?

9 [ARPAIO]: Yes.

10 THE COURT: All right. Thank you, sir.

11 (Doc. 1677 ¶ 351.)

12 Despite this Court's order that Sheriff Arpaio personally direct compliance with
13 this Court's preservation and production orders with regard to the Montgomery materials,
14 the Sheriff failed to do so. He subsequently testified that he "wasn't personally involved"
15 with this Court's order regarding the preservation and the production of the Montgomery
16 materials and that he did not recall having any discussion with anyone about the order.
17 (*Id.* ¶¶ 354–55; *see also* Doc. 1417 at Tr. 1589 (Chief Deputy Sheridan's assumption that
18 Sheriff Arpaio intended to delegate to him the production of the Montgomery materials).)

19 There is probable cause to believe that the Sheriff intentionally failed to produce
20 all of the documents he had in response to this Court's order. Specifically, at the time the
21 Court issued the above order, the Sheriff knew that Montgomery had given the MCSO 50
22 hard drives that Montgomery claimed to be the master database of records that he had
23 supposedly purloined from the CIA. (Doc. 1677 ¶ 353; Doc. 1455 at Tr. 2064; Doc. 1457
24 at Tr. 2331–32; Doc. 1458 at Tr. 2561–63.) To reveal those hard drives would have
25 revealed that they did not contain the materials that Montgomery had described. It also
26 may have called into question some of Sheriff Arpaio's other ongoing investigative
27 activities in which he had partnered with Montgomery, such as the alleged illegitimacy of
28 President Barack Obama's birth certificate. (*See* Doc. 1677 ¶¶ 360–63.) It would also
reveal that the MCSO actually took possession of, and intended to use, material that it
believed to have been stolen from the CIA.

Neither Sheriff Arpaio nor anyone else at the MCSO disclosed the hard drives in

1 response to this Court's order or the Monitor's subsequent follow-up ITRs. Only months
2 later, during the July 2015 site visit, did the Monitor independently discover the existence
3 of the hard drives, which had been placed in a locker in the property and evidence
4 department under a Departmental Report number designed to shield their disclosure. (*Id*
5 ¶ 356.) This failure to produce the 50 hard drives violates this Court's April 23, 2015
6 directive requiring such production. It further violates orders requiring the Sheriff and
7 the MCSO to comply with all document requests made by the Monitor as well as the
8 directive that the Sheriff cooperate with the Monitor and withhold no information from
9 him. (Doc. 700 at Tr. 71–73.)

10 The Sheriff now claims that he “wasn't personally involved” in implementing the
11 Court's order. (Doc. 1677 ¶¶ 354–55.) The circumstances provide probable cause to
12 believe otherwise. Even if it were as the Sheriff claims, however, the Sheriff still
13 violated this Court's orders to personally direct the preservation and production of all
14 such documents.

15 **3. The Sheriff and Chief Deputy's False Testimony**

16 Perjury is a crime. 18 U.S.C. § 1621. So is a false declaration to the court. 18
17 U.S.C. § 1623. Perjury can also provide a separate basis for a criminal contempt charge,
18 but only when it results in an actual obstruction or attempt at obstruction of justice. *In re*
19 *Michael*, 326 U.S. 224, 227–28 (1945); *Ex parte Hudgings*, 249 U.S. 378, 383–84
20 (1919); *see also* § 401. The law also requires that even false testimony given in an
21 attempt to obstruct justice cannot provide the basis for a separate criminal contempt
22 charge unless “from the testimony itself it is apparent that there is a refusal to give
23 information which in the nature of things the witness should know.” *Collins v. United*
24 *States*, 269 F.2d 745, 750 (9th Cir. 1959).

25 This Court has found, under the civil standard of proof, that Sheriff Arpaio and
26 Chief Deputy Sheridan intentionally made a number of false statements under oath.
27 There is also probable cause to believe that many if not all of the statements were made
28 in an attempt to obstruct any inquiry into their further wrongdoing or negligence.

1 Nevertheless, as expressed above, “the test is not whether the testimony was perjurious or
 2 false but whether without the aid of extrinsic evidence the testimony is ‘so plainly
 3 inconsistent, so manifestly contradictory, and so conspicuously unbelievable as to make it
 4 apparent from the face of the record itself that the witness has deliberately concealed the
 5 truth and has given answers which are replies in form only and which, in substance, are
 6 as useless as a complete refusal to answer.’” *Collins*, 269 F.2d at 750 (9th Cir. 1959)
 7 (citation omitted).

8 Although their testimony is internally inconsistent in many respects, the falsity of
 9 that testimony is best demonstrated by evidence extrinsic to their own testimony, rather
 10 than “from the testimony itself.” *Id.* Thus, though the false testimony may provide a
 11 potential basis for a criminal prosecution, it cannot be separately charged as
 12 contemptuous.

13 **4. Criminal Contempt Charges Are Warranted for Sheriff Arpaio**

14 As has been more extensively set forth by the Court in its Findings of Fact, (Doc.
 15 1677), Sheriff Arpaio and Chief Deputy Sheridan have a history of obfuscation and
 16 subversion of this Court’s orders that is as old as this case and did not stop after they
 17 themselves became the subjects of civil contempt.

18 Almost immediately after the Court entered its original October 2, 2013 injunctive
 19 order, (Doc. 606), the Court had to amend and supplement the order and enter further
 20 orders because: (1) the Sheriff refused to comply in good faith with the order’s
 21 requirement that he engage in community outreach, (Doc. 670; *see also* Doc. 1677
 22 ¶¶ 368, 368 n.13), and (2) the Sheriff and his command staff were mischaracterizing the
 23 content of the order to MCSO deputies and to the general public, (Doc. 680; *see also*
 24 Doc. 1677 ¶ 367). Both of these revisions increased the duties of the appointed Monitor
 25 at the expense of county taxpayers.

26 Within one month of those revisions, the Defendants disclosed to the Court the
 27 arrest, suicide, and subsequent discovery of misconduct of Deputy Ramon “Charley”
 28 Armendariz who had been a significant witness at the trial of the underlying matter.

1 Among other things, the disclosure of Armendariz's misconduct eventually resulted in
2 the determination that: (1) the Sheriff had not complied with his discovery obligations in
3 the underlying action, (*see* Doc. 1677 ¶¶ 213–17); (2) that MCSO supervisors had long
4 been aware of Armendariz's problematic behavior and misconduct and had not
5 appropriately supervised Armendariz and many other deputies; (3) the MCSO was
6 routinely depriving members of the Plaintiff class of their property and retaining it
7 without justification; (4) the Sheriff had done nothing to implement this Court's 2011
8 preliminary injunctive order; and (5) the Sheriff was not investigating the allegations of
9 misconduct in good faith—especially those that pertained to him or to members of his
10 command staff.

11 Sheriff Arpaio and Chief Deputy Sheridan intentionally manipulated the
12 investigations they initiated in response to the misconduct revealed by the Armendariz
13 discovery to engineer pre-determined results, (*id.* ¶¶ 609–47), to prevent effective
14 investigations, (*id.* ¶¶ 424–34), to cause investigations to be untimely, (*id.* ¶¶ 574–83),
15 and to fail to follow up on appropriate allegations, (*id.* ¶¶ 648–54). Moreover, the
16 investigations were conducted pursuant to policies that discriminated against the Plaintiff
17 class. (*Id.* ¶¶ 509–14.)

18 Although the Monitor pointed out many investigative flaws early on, they were
19 never corrected nor even recognized as flaws. (*Id.* ¶¶ 655–69.) In fact, it was not until
20 November 2014 that the MCSO finally informed the Court that the videotapes found in
21 Armendariz's garage demonstrated that the MCSO had done nothing to implement this
22 Court's December 23, 2011 preliminary injunction.² Shortly after that discovery, Sheriff
23 Arpaio and Chief Deputy Sheridan, among others, became the subjects of civil contempt
24 proceedings. Thereafter, the Sheriff, Chief Deputy Sheridan, and members of their
25 command staff misstated facts to both the MCSO investigators and those of the Monitor
26 team. (*See, e.g., id.* ¶¶ 15, 15 n.4, 337, 517–19.) Disciplinary processes were further

27
28 ² The Court had been aware of some violations of its preliminary injunction in making its May 2013 Order. It did not know until November 2014, however, that the Sheriff had taken no steps to implement that Order.

1 subverted by appointing a biased decision-maker. (*Id.* ¶¶ 439–55, 484–89.) Despite this
2 Court’s order that the Sheriff keep the Court updated on the initiation and completion of
3 the IA investigations, (Doc. 795 at 17), he did not timely or adequately do so. Further,
4 when Sheriff Arpaio and Chief Deputy Sheridan took the stand during the contempt
5 hearings in April, September, and October 2015, they both gave intentionally false
6 testimony under oath concerning the Montgomery investigation and at least several
7 MCSO internal affairs operations.

8 As is discussed above, in the period between their April 2015 and
9 September/October 2015 testimony, contrary to the Court’s orders to do so, Sheriff
10 Arpaio provided no direction to the MCSO in the preservation and production of the
11 Montgomery materials and neither he nor Chief Deputy Sheridan disclosed those
12 materials as ordered. Further, in July 2015, when an additional 1459 IDs were
13 discovered, which included many IDs belonging to members of the Plaintiff class, Chief
14 Deputy Sheridan concealed the IDs from the Monitor and ordered that Captain Bailey
15 suspend the relevant IA investigation into them in an attempt to evade this Court’s order
16 requiring disclosure of that IA and the Monitor’s complete access to that investigation.
17 Chief Deputy Sheridan then made misstatements of fact both to the media and to the
18 Monitor about his actions.

19 In the face of the above misconduct, Sheriff Arpaio’s proffered list of the steps he
20 has taken over the last three years to comply with this Court’s initial order falls flat as a
21 justification for not initiating a criminal contempt hearing. The Monitor reports that now,
22 nearly three years after the promulgation of that order, the Sheriff is only in compliance
23 with 63% of his Phase I obligations and 40% of his Phase II obligations. (Doc. 1759 at
24 180.) Further, the Monitor notes that “we continue to find supportive, well-intentioned
25 sworn and civilian personnel in administrative and operation units of MCSO. What is
26 lacking is the steadfast and unequivocal commitment to reform on the part of MCSO’s
27 leadership team—most notably the Sheriff and Chief Deputy.” (*Id.* at 181.)

28 The Sheriff promises a new willingness to implement this Court’s orders. (Doc.

1 1770.) Such assurances are not new, and they have proven hollow in the past. When the
2 Montgomery misconduct was disclosed, the Sheriff represented in response to orders of
3 this Court that he would provide his full cooperation to the Monitor. (Doc. 700 at Tr. 70–
4 73.) He has represented that he would conduct complete and full IA investigations, that
5 he would implement and had been fully implementing this Court’s order, and that he
6 would hold persons responsible for their misconduct no matter how high in the office the
7 investigations took him. (*Id.* at Tr. 97.) He also promised to personally direct the
8 preservation and production of the Montgomery documents. (Doc. 1027 at Tr. 650–60.)
9 He has done none of these things.

10 As a result of his previously undisclosed and additional misconduct, the Court has
11 recently entered supplementary remedial orders. The Sheriff’s defiance has been at the
12 expense of the Plaintiff class. The remedies are at the expense of the citizens of
13 Maricopa County. Little to no personal consequence results to the Sheriff. As a practical
14 matter, the County indemnifies its officeholders for their civil contempt and the county
15 treasury bears the brunt of the remedy for the Sheriff’s § 1983 violations. While one of
16 the civil remedies imposed by the Court creates an independent disciplinary process to
17 impose the MCSO’s own employee discipline policies in a fair and impartial manner, the
18 Sheriff is an elected official and not an employee of the Sheriff’s office. He is thus not
19 subject to MCSO disciplinary policy or this Court’s civil remedy.

20 This lack of personal consequence only encourages his continued non-compliance.

21 Sheriff Arpaio offers to put “‘skin in the game’ consistent with the suggestions
22 discussed in 2015.” (Doc. 1770 at 11.) As the Court observed in response to that 2015
23 offer, however, payments made by the Sheriff that are funded by the donations of others
24 do not provide the Sheriff with sufficient personal consequence to deter continued
25 misconduct. Further, since the time he made that offer, the Sheriff’s civil contempt has
26 been found to be intentional, and the Sheriff has continued to commit acts of obstruction.
27 To the extent the Sheriff’s offer could be considered an offer of settlement it should be
28 evaluated by a prosecuting authority.

1 Sheriff Arpaio may be in charge of the MCSO for the foreseeable future. In doing
 2 so, he must follow the law. If this Court had the luxury of merely entering what orders
 3 were necessary to cure a one-time obstruction, or if the Sheriff had evidenced a genuine
 4 desire to comply with the orders of this Court, it would be a different matter. The Court
 5 has exhausted all of its other methods to obtain compliance.

6 Therefore, in light of the seriousness of this Court's orders and the extensive
 7 evidence demonstrating the Sheriff's intentional and continuing non-compliance, the
 8 Court refers Sheriff Joseph M. Arpaio to another Judge of this Court to determine
 9 whether he should be held in criminal contempt for: (1) the violation of this Court's
 10 preliminary injunction of December 23, 2011,³ (2) failing to disclose all documents that
 11 related to the Montgomery investigation in violation of this Court's specific order entered
 12 orally on April 23, 2015, (Doc. 1027 at Tr. 625–60), and the Monitor's follow-up ITRs
 13 for this material in violation of this Court's orders requiring compliance with the
 14 Monitor's requests, (Doc. 606 ¶ 145; Doc. 700 at Tr. 71–73; Doc. 795 at 20), and (3) his
 15 intentional failure to comply with this Court's order entered orally on April 23, 2015 that
 16 he personally direct the preservation and production of the Montgomery records to the
 17 Monitor, (Doc. 1027 at Tr. 625–60).

18 **B. Chief Deputy Sheridan, Captain Bailey, and Michele Iafrate Intentionally**
 19 **Violated Court Orders**

20 Pursuant to numerous Court orders, the MCSO and all of its agents were subject to
 21 certain unequivocal and affirmative obligations of candor, disclosure, and accessibility to
 22 this Court, its appointed Monitor, and the parties, with respect to, among other things,
 23 internal affairs investigations and documents. (*See, e.g.*, Doc. 606 ¶¶ 145-47 (October 2,
 24 2013); Doc. 700 at Tr. 71–77 (May 14, 2014), Doc. 795 at 16–21 (November 20, 2014);

26 ³ The County and the Plaintiffs have extensively negotiated in good faith a system
 27 to reimburse in part some of the victims of the Sheriff's misconduct. But, it is extremely
 28 unlikely that all who were detained will benefit from this good faith effort. Nor did the
 violation of the Court's orders harm only those who were detained beyond 20 minutes.
 (*See, e.g.*, Doc. 1677 ¶¶ 161–63.) Thus, the Sheriff's non-compliance created many
 victims who will go uncompensated.

1 Doc. 825 at 2 (December 9, 2014); and Doc. 881 at 2 (February 12, 2015).) These orders
2 were nevertheless intentionally violated by members of the MCSO's command staff and
3 its agents.

4 **1. Chief Deputy Gerard Sheridan**

5 As this Court has already determined pursuant to a civil standard of proof, Chief
6 Deputy Sheridan has engaged in misconduct in violation of his obligations to this Court,
7 the Monitor, and the parties, including the following: (1) Chief Deputy Sheridan knew of
8 this Court's December 2011 preliminary injunction and intentionally disobeyed it, (*see*
9 Doc. 1677 ¶¶ 1–10, 66–92); (2) Chief Deputy Sheridan did not produce the 50 hard
10 drives of material received from Montgomery in response to this Court's order; (3) Chief
11 Deputy Sheridan, after the evidentiary hearing began, directed that the discovery of 1459
12 IDs and the investigation into them be concealed in part by "suspending" the
13 investigation and by failing to disclose them, (*Id.* ¶¶ 297–304); (4) Chief Deputy
14 Sheridan, after his suspension of the IA investigation into the 1459 IDs, falsely asserted
15 to the Monitor team that the investigation had always been open as far as he had been
16 concerned, (Doc. 1465 at Tr. 1373–74); (5) Chief Deputy Sheridan twice made false
17 statements to the Monitor about who ordered Chief Trombi to send out MCSO-wide
18 emails on May 14, 2014, (Doc. 1677 ¶¶ 226–33); (6) Chief Deputy Sheridan intentionally
19 made a number of false statements under oath; (7) Chief Deputy Sheridan manipulated
20 the MCSO's own internal affairs investigations to subvert a fair investigative process;
21 and (8) Chief Deputy Sheridan directed the mishandling of grievances to avoid personal
22 responsibility for granting them. Some or all of these incidents could be tried as separate
23 acts of criminal contempt. However, the Court desires to place practical limits on the
24 charges against Chief Deputy Sheridan so as to avoid an expensive retrial of all of the
25 same issues for which the Court has recently entered civil remedies.

26 Chief Deputy Sheridan asserts that a referral for criminal contempt is not
27 necessary because the independent authority appointed by the Court to investigate and
28 mete out appropriate discipline under MCSO policy will likely discipline him for at least

1 some of the above misconduct and possibly for other misconduct that would not qualify
2 as contemptuous. The Court acknowledges this possibility and further acknowledges that
3 the civil remedies entered in this case may provide some deterrence to any future
4 misconduct by Chief Deputy Sheridan—especially when accomplished in conjunction
5 with a referral to the Arizona Peace Officer Standards and Training Board (“POST”).

6 Nevertheless, Chief Deputy Sheridan is the MCSO’s highest ranking employee. A
7 number of his acts were attempts to conceal evidence of misconduct—either his own or
8 the MCSO’s—and to evade responsibility for such acts. Moreover, the concealments
9 violated direct and clear orders of this Court and indicate a desire by Sheridan to frustrate
10 a full accounting of the MCSO’s misconduct by those in charge—even if the Court
11 ultimately became aware of the concealments at issue. In light of the seriousness of the
12 charges, and the quality of the evidence that establishes them, the possibility of MCSO
13 discipline and a referral to POST simply do not suffice as sufficient remedies. Yet,
14 because there is some remedy that resulted from the evidentiary hearing that applies to
15 the Chief Deputy, and because the Court does not wish to oblige a new Court to retry all
16 of Chief Deputy Sheridan’s possible contemptuous conduct to determine whether
17 criminal contempt is appropriate, this Court will refer Chief Deputy Sheridan for only
18 two of the above acts. There is probable cause to believe that he is either the instigator or
19 one of the main actors in each of these instances, both of which arose after Chief
20 Sheridan was already noticed for civil contempt.

21 Accordingly, as explained below, the Court finds that there is probable cause to
22 conclude that Chief Deputy Sheridan was a main actor in intentionally withholding the 50
23 Montgomery hard drives from production to the Court. It further finds that there is
24 probable cause to conclude that Sheridan was the instigator and perpetrator of a plan to
25 conceal from this Court and the Monitor the 1459 IDs and the resulting IA investigation
26 that came to light during the pendency of the evidentiary hearing on contempt.

27 **a. The Montgomery Materials**

28 Chief Deputy Sheridan was in Court on April 23, 2015, and he heard this Court

1 order Sheriff Arpaio to personally direct the preservation and production of the
 2 Montgomery materials. (*See generally* Doc. 700.) He admitted that he knew that this
 3 Court had ordered the production of all of the Montgomery materials. (Doc. 1417 at Tr.
 4 1595.) He testified that he assumed that Sheriff Arpaio intended to delegate to him the
 5 production of the Montgomery materials. (*Id.* at Tr. 1589). He also testified that he
 6 fulfilled the assumed assignment by directing Chief Knight to Detective Mackiewicz.
 7 Sheridan testified that he told Chief Knight that Mackiewicz held all of the records
 8 pertaining to the Montgomery investigation.⁴ (*Id.* at Tr. 1589, 1595.)

9 At the time he accepted that assumed delegation, however, Chief Deputy Sheridan
 10 knew that the MCSO was in possession of the 50 hard drives from Montgomery. (*See,*
 11 *e.g., id* at Tr. 1582–83 (Sheridan testified to knowing about the 50 hard drives as early as
 12 November 14, 2014, when he received an email from Mackiewicz (Ex. 2531) confirming
 13 that “the vast majority of the information that [Montgomery] gave [the MCSO] on those
 14 50 hard drives was nothing but junk . . .”).) He also knew at this point that revealing the
 15 contents of the 50 hard drives would prove that Montgomery had defrauded the MCSO
 16 and would demonstrate that the MCSO had taken and was using material it believed to be
 17 stolen from the CIA. (*Id.*) The hard drives had been placed in the MCSO’s property
 18 room. (Doc. 1677 ¶ 356; *see also* Doc. 1455 at Tr. 2160–65 (Lieutenant Seagraves
 19 testified that at least as of May 2015, individuals in her “chain of command” knew that
 20 the 50 hard drives had been categorized as “found property” under Detective
 21 Mackiewicz’s name and placed in the MCSO’s property and evidence room).)

22 Despite his knowledge, Chief Deputy Sheridan did not inform Chief Knight of the
 23 existence or location of the 50 hard drives in directing him to comply with this Court’s
 24 order or the Monitor’s ITRs. Apparently Detective Mackiewicz didn’t either. As

26 ⁴ As this Court has previously found, in addition to their employment, there are
 27 outside business and personal relationships between Sheridan and Mackiewicz that have
 28 resulted in what appears to be other coordinated misconduct between them. (*See, e.g.,*
 Doc. 1677 ¶¶ 766–825.) Sheriff Arpaio stated he has gratitude for Detective
 Mackiewicz. He also had an unusual and direct reporting relationship with Detective
 Mackiewicz as it pertained to the Montgomery investigation. (*Id.* ¶ 370.)

1 mentioned above, months later, during the July 2015 site visit, the Monitor independently
2 discovered the existence of the hard drives in the MCSO's property and evidence room.
3 (Doc. 1677 ¶ 356; Doc. 1455 at Tr. 2160–65.)

4 When the Court discovered the existence of the concealed hard drives together
5 with the concealed IDs discussed below, it ordered the United States Marshal to take
6 custody of them. (Doc. 1677 ¶ 324.) That evening in a media interview, Chief Deputy
7 Sheridan falsely stated that nobody had ever asked the MCSO for the materials that the
8 Court had ordered to be delivered to the Marshals. (*Id.* ¶ 325.) This failure to produce
9 the 50 Montgomery hard drives violated this Court's April 23, 2015 directive requiring
10 such production. It further violated orders requiring the Sheriff and the MCSO to comply
11 with all document requests made by the Monitor as well as the directive that the Sheriff
12 and the MCSO cooperate with the Monitor and withhold no information from him. (Doc.
13 700 at Tr. 71–73.)

14 **b. 1459 IDs and the Related IA Investigation**

15 Since the establishment of the Monitorship, this Court has ordered the Sheriff and
16 the MCSO to provide the Monitor with all documents that the Monitor requested. (Doc.
17 606 ¶ 145.) Directives for complete cooperation and compliance with the Monitor's
18 investigations have been repeated in this Court's subsequent orders. (Doc. 795 at 20.)
19 Further, in the May 14, 2014 hearing concerning the Armendariz discoveries, this Court
20 personally ordered Sheriff Arpaio and Chief Deputy Sheridan to fully cooperate with the
21 Monitor team in their investigations resulting from those discoveries. They agreed to do
22 so. (Doc. 1677 ¶ 222; Doc. 700 at Tr. 71–73, 97.)

23 In response to these orders, the Sheriff began making two different reports to the
24 Monitor after May 14, 2014. First, he began reporting the collection of video and audio
25 recordings, and second, at the direction of the Monitor, he began noting and updating the
26 Monitor on any new IA cases that arose from the May 14 revelations.

27 This obligation was further memorialized in this Court's order of November 20,
28 2014. (Doc. 795.) First, that order required the MCSO to make affirmative and detailed

1 disclosures to this Court and the Monitor when it opened an IA investigation relating to
2 this lawsuit.⁵ (*Id.* at 18–19.) Second, the order also required that “the Monitor must
3 necessarily have complete access to Defendants’ internal affairs investigations. This
4 includes familiarity with the manner in which MCSO pursues an investigation—be it
5 criminal or administrative in nature—the investigation’s initial and continuing scope in
6 light of the information the investigation uncovers, the performance of the investigations,
7 and the kind of discipline—if any—ultimately imposed at its conclusion.” (*Id.* at 17.) A
8 follow-up order repeated this requirement after Ms. Iafrate, attorney for the MCSO,
9 objected to it. (Doc. 825 at 1.) Third, the order required that MCSO fully cooperate with
10 the Monitor in his investigations. (Doc. 795 at 20.).

11 Although the MCSO’s investigations into the matters arising from the Armendariz
12 discoveries were flawed, they did minimally confirm that MCSO deputies took IDs and
13 other items of personal property from members of the Plaintiff class without a basis for
14 doing so. Such previously undisclosed seizures, their extent, and the adequacy of the
15 MCSO’s investigation into such misconduct were relevant to the harm inflicted on the
16 Plaintiff class and the requisite appropriate remedies, thus they became one of the
17 principal topics of the evidentiary hearing.

18 On February 12, 2015, this Court granted Plaintiffs’ request and entered an order
19 requiring the MCSO to produce “[c]opies of identification documents seized by MCSO
20 personnel from apparent members of the Plaintiff Class” by the end of February 2015.
21 (Doc. 881 at 2.)

22 In April 2015, the MCSO sent out a briefing board requiring its personnel to turn
23 in such IDs. (*See, e.g.*, Doc. 1465 at Tr. 1243–46, 1375, Ex. 2065.) Between the time
24 that this Court had ordered such disclosure in February, and before July 2015, the MCSO
25 had informed the Monitor of the opening of five IA cases relating to the discovery of
26 additional caches of IDs within the MCSO.

27
28 ⁵ The Court’s December 9, 2014 clarification order further made clear that the
information had to be provided not only to the Court and to the Monitor, but also to the
Plaintiffs and the United States Attorney. (Doc. 825 at 2.)

1 In the middle of the evidentiary hearing, on July 7, 2015, Captain Bailey became
2 aware that an additional 1459 IDs had been turned into property and evidence for
3 destruction by Sergeant Knapp. (Doc. 1677 ¶¶ 295–97.) Bailey began an internal affairs
4 investigation into the IDs on that same day and assigned it IA #2015-511. (*Id.* ¶¶ 297–
5 98.)

6 On that same day, Bailey also reported the discovery to Chief Deputy Sheridan
7 who asked him to ascertain some facts about the IDs. (Doc. 1498 at Tr. 3861–62.)
8 Bailey quickly ascertained and told Sheridan that the IDs were gathered by Knapp from
9 the destruction bin in property and evidence between 2006 and 2010. (Doc. 1465 at Tr.
10 1347.)

11 When Chief Deputy Sheridan learned of the discovery of the 1459 IDs, he did not
12 disclose them to the Monitor or the parties even though he knew that the Monitor and the
13 parties would want to know of their existence. He testified that while he is not an
14 alarmist, even he was alarmed by the discovery of so many IDs. He believed the Monitor
15 team would “overreact and create a huge problem” if they were informed of the existence
16 of the IDs. (Doc. 1465 at Tr. 1363–64, 1367.) He also testified that he did not want to
17 replicate the investigations that the MCSO had undertaken with respect to the
18 Armendariz IDs. (*Id.*) He, therefore, ordered Captain Bailey to suspend the investigation
19 into the 1459 IDs. (*Id.* at 1347.) In doing so, and in not disclosing the opening or the
20 suspension of the investigation to the Monitor, he violated the terms of this Court’s
21 November 20 orders, and provides probable cause to believe that he knowingly and
22 intentionally did so. He knew these orders required cooperation, the provision of
23 information that IA investigations be affirmatively disclosed, that the Monitor be given
24 complete access to such investigations, and that any concern about the Monitor’s right of
25 access be decided by the Court. (*Id.* at Tr. 1378–81.)

26 In addition, when the 1459 IDs were discovered, Sheridan knew of this Court’s
27 February 2015 orders that the MCSO must produce IDs that belonged to apparent
28 members of the Plaintiff class. (*Id.* at Tr. 1347–48.) Both Bailey and Sheridan realized

1 that because the IDs were taken from the property room, they were likely seized during
2 MCSO operations. (Doc. 1677 ¶¶ 299–300, 340.) And within a few days of their
3 discovery, Sheridan knew that approximately 30% of the 1459 IDs had Hispanic
4 surnames. (Doc. 1465 at Tr. 1357–58.) By that time Sheridan had concern that
5 disclosure would be required. (Doc. 1677 ¶ 340; Doc. 1465 at Tr. 1353.) He thereafter
6 consulted with Ms. Iafrate to determine whether there was a way to avoid disclosing the
7 IDs to the Monitor.

8 The Monitor scheduled a week-long quarterly site visit two weeks later during the
9 week of July 20–24, 2015. On July 17, the Friday before the site visit, Ms. Iafrate held a
10 meeting with the PSB staff to rehearse answers to questions that they might receive from
11 the Monitor during the site visit. Chief Deputy Sheridan and Captain Bailey were at the
12 meeting.

13 At the meeting, Lieutenant Seagraves, who knew of the 1459 IDs, asked
14 Ms. Iafrate what they should do if the Monitor asked about whether any new IDs were
15 found. Ms. Iafrate instructed those present that the PSB should not disclose the existence
16 of the IDs to the Monitor team because she did not believe that the MCSO was required
17 to disclose the IDs pursuant to this Court’s orders and planned to do further research on
18 the matter. (Doc. 1455 at Tr. 2239–40; Doc. 1677 ¶ 310.) Chief Deputy Sheridan
19 testified that he had no recollection of such instruction. (Doc. 1465 at Tr. 1353.) Captain
20 Bailey likewise testified that such instruction did not occur in this general meeting. (Doc.
21 1498 at Tr. 3867.) Although, Captain Bailey’s subsequent briefing argues that it did
22 occur based on the testimony of Seagraves. (Doc. 1750 at 4).

23 Sheridan and Bailey both testified that, after the meeting, Ms. Iafrate had another
24 meeting with them at which she instructed them that it would be premature to disclose the
25 ID’s voluntarily during the Monitor’s site visit the following week.⁶ (Doc. 1465 at Tr.
26 1356; Doc. 1498 at Tr. 3867). Sheridan also testified that at this meeting Bailey asked

27
28 ⁶ Bailey’s testimony to this effect is undercut by his later testimony that he never
discussed any potential questions by the Monitor team with Ms. Iafrate prior to the
meeting on July 20th. (Doc. 1498 at Tr. 3868, 3871.)

1 Ms. Iafrate how he should answer if he was directly asked about the IDs by the Monitor.
2 Sheridan testified that Ms. Iafrate instructed Bailey that in such a case he was to go ahead
3 and tell the Monitor about them. (Doc. 1465 at Tr. 1356–57). Bailey contradicts
4 Sheridan’s testimony in this respect. (Doc. 1498 at Tr. 3868, 3871.) In fact, Bailey
5 testified that he never discussed with Ms. Iafrate any potential questions by the Monitor
6 team prior to the meeting on July 20. (Doc. 1498 at Tr. 3868, 3871.)

7 On the 20th, the following Monday, Ms. Iafrate and member of the PSB met with
8 members of the Monitor team. During the course of the meeting, Chief Kiyler of the
9 Monitor team asked whether any new IDs had been found.⁷ Captain Bailey untruthfully
10 answered no. Both Captain Bailey and Lieutenant Seagraves testified that he gave this
11 answer upon the instruction of Ms. Iafrate who was present in the meeting. (Doc. 1677
12 ¶¶ 314–18.)

13 When, two days later, the existence of the IDs was disclosed to the Monitor, Chief
14 Deputy Sheridan testified that Captain Bailey expressed his concern that his previous
15 answer to the Monitor regarding the IDs would appear untruthful.⁸ Chief Deputy
16 Sheridan testified however that he told Bailey that he was not concerned that it would
17 appear as if the MCSO had sought to conceal the identifications because Captain Bailey
18 was following the advice of Ms. Iafrate, and Ms. Iafrate had not gotten back to Chief
19 Deputy Sheridan yet on whether there was even any obligation at all to disclose the IDs.
20 (Doc. 1465 at Tr. 1359–60.)

21 When the Court discovered the existence of the concealed IDs and the concealed
22 hard drives, it ordered the United States Marshal to take custody of them. (Doc. 1677
23 ¶ 324.) That evening in a media interview, Chief Deputy Sheridan falsely stated that
24 nobody had ever asked the MCSO for the materials that the Court had ordered to be
25 delivered to the Marshals. (*Id.* ¶ 325.) Thereafter, Sheridan also falsely stated in an

26
27 ⁷ Captain Bailey testified that the question was whether there were any other
28 pending investigations regarding identifications. (Doc. 1498 at 3869.) As will be
explained below, regardless of the question, Bailey’s answer was untruthful.

⁸ Captain Bailey also denies this. (Doc. 1498 at Tr. 3875.)

1 interview to a member of the Monitor team that as far as he was concerned the
2 investigation into the 1459 IDs had always been open. In his subsequent courtroom
3 testimony, however, he acknowledged that he had ordered the suspension of the
4 investigation into the IDs; nevertheless, when confronted with his statement to the
5 Monitor that the investigation had always been open, he asserted that he only meant to
6 partially suspend the investigation into the IDs and Captain Bailey must have
7 misunderstood him. As this Court has previously found under a civil standard of proof,
8 this testimony is not credible. (*Id.* ¶¶ 337–39.)

9 Chief Deputy Sheridan asserts that he did not act willfully because his counsel—
10 Ms. Iafrate—had given him advice that it would be premature to disclose the existence of
11 the IDs to the Monitor until she got back to him. There are at least three problems with
12 this argument.

13 First, “[a]lthough a defendant’s good faith belief that he is complying with the
14 order of the court may prevent a finding of willfulness, good faith reliance on the advice
15 of counsel to disobey a court order will not.” *United States v. Armstrong*, 781 F.2d 700,
16 706 (9th Cir. 1986) (footnote omitted). In *Armstrong*, it was not contested that
17 Armstrong relied on the advice of his counsel that he did not have to testify before the
18 grand jury. Nevertheless, he was personally aware of the court’s order that he was
19 required to do so, and there was no evidence that he believed that his refusal to testify
20 complied with the court’s order. *Id.* at 707. In rejecting a good faith reliance defense for
21 criminal contempt in this circuit, the Ninth Circuit noted “[i]n litigation frequently the
22 client must assume the risk of his advisor’s errors.” *Id.* at 706 (quoting *Steinert v. United*
23 *States*, 571 F.2d 1105, 1108 (9th Cir. 1978)). It noted that to hold otherwise would make
24 it too easy for parties to avoid punishment for their disobedience of court orders with
25 which they were familiar by merely receiving the advice of their counsel that they not
26 comply. *Id.* The “critical inquiry is whether the appellants were aware that they were
27 disobeying a lawful court order[,]” regardless of the advice of counsel. *Id.* at 707. Chief
28 Deputy Sheridan and Captain Bailey’s counsel cite *United States v. Snyder*, 428 F.2d 520

1 (9th Cir. 1970), for the proposition that “a party may defend against criminal contempt on
2 the basis of good faith reliance upon the advice of counsel.” (Doc. 1745 at 23; *see also*
3 Doc. 1750 at 7, 9–10.) These are incorrect statements of the law when the parties were
4 aware, like the parties are here, of the court orders being violated. In making this
5 erroneous assertion, counsel not only fails to cite *Armstrong*, they also misstate the
6 holding of *Snyder* itself. *Snyder* states that the advice of counsel “is no defense” to a
7 contempt charge. *Snyder*, 428 F.2d at 522.

8 As *Armstrong* explains, the relevant question is whether Sheridan had a good faith
9 belief that he was complying with the order of this Court. *Armstrong*, 781 F.2d at 706.
10 Here, there is probable cause to believe that Chief Deputy Sheridan did not have such a
11 belief despite any advice he may have received from counsel. He admitted that when the
12 1459 IDs were discovered he was aware of this Court’s order that such IDs needed to be
13 disclosed. He knew that the IDs were taken from the destruction bin during the years that
14 the MCSO was conducting immigration enforcement operations. He also knew and
15 reported to Ms. Iafrate shortly thereafter that 30% of the IDs were of persons with
16 Hispanic surnames. (Doc. 1465 at Tr. 1357.) He knew that the MCSO had previously
17 disclosed to the Monitor that it had initiated other separate IA investigations into a
18 number of IDs found under similar circumstances. He was also aware that the IDs and
19 the MCSO’s failure to adequately investigate them were relevant topics in the evidentiary
20 hearing—this Court had questioned him on such IDs during the initial round of testimony
21 in April 2015. He also admitted that he thought there was a likelihood that he had to
22 disclose the IDs. (Doc. 1677 ¶ 340; Doc. 1465 at Tr. 1353.) Finally, Sheridan knew of
23 this Court’s orders requiring the MCSO to disclose IA investigations to the Monitor and
24 to grant the Monitor full access to such investigations; he also knew that the Court had
25 outlined a way for the MCSO to dispute the Monitor’s right to access investigations and
26 documents. Nevertheless, he did not disclose the IDs and he did not follow the Court’s
27 procedures for contesting the Monitor’s access to them.

28 Chief Deputy Sheridan’s testimony is rife with contradictions. He testified that he

1 always intended to disclose the 1459 IDs to the Monitor team, yet after suspending the
2 investigation into the IDs, he consulted with Ms. Iafrate on whether the MCSO had to
3 disclose the IDs at all. He testified that he only wanted to withhold knowledge of the IDs
4 from the Monitor team until he could get the full and straight story, (Doc. 1465 at Tr.
5 1349, 1363–64), yet he ordered Captain Bailey to suspend the investigation into the IDs
6 and acknowledged that an investigation would have been the way to get the whole story
7 before disclosing the IDs to the Monitors, (*id.* at Tr. 1349). He gave multiple incongruent
8 accounts of whether the investigation was open or suspended.

9 Under such circumstances, regardless of how Ms. Iafrate advised Sheridan, there
10 is probable cause to believe that Sheridan did not have a good faith belief that he was
11 complying with this Court’s orders in withholding the existence of the 1459 IDs or the
12 investigation into them from the Monitor. *Armstrong*, 781 F.2d at 706.

13 Second, in reaction to learning about the 1459 IDs and the IA investigation into
14 them, Chief Deputy Sheridan ordered Captain Bailey to suspend the IA investigation.
15 Although he admits that he was aware of this Court’s November 20, 2014 Order, (*id.* at
16 Tr. 1378–81), his suspension of the investigation further demonstrated his awareness of at
17 least this Court’s orders that: (1) the MCSO make affirmative and detailed disclosures
18 about any investigations relating to this lawsuit once the investigation began, and (2) that
19 the Monitor be given complete access to all MCSO internal affairs operations to assess
20 “the manner in which MCSO pursues an investigation[,] . . . the investigation’s initial and
21 continuing scope in light of the information the investigation uncovers, the performance
22 of the investigations, and the kind of discipline—if any—ultimately imposed at its
23 conclusion.” (Doc. 795 at 17.)

24 The suspension of the investigation—when its existence required affirmative
25 disclosure and complete access to the Monitor—provides probable cause to believe that
26 Sheridan’s noncompliance was intentional. He ordered the suspension before consulting
27 with Ms. Iafrate. Likewise, the fact that he changed his story multiple times as to
28 whether the investigation was suspended, always open, or partially suspended but

misunderstood by Captain Bailey, provides further probable cause of his intent to violate court orders. Although this bears on Chief Deputy Sheridan's credibility, as this Court has previously discussed, Sheridan's suspension of the investigation does not in any way prevent his court-ordered obligation to report it and give the Monitor complete access to it.⁹

Third, Ms. Iafrate, who did not otherwise testify at the evidentiary hearing, has denied to the Court that she gave any instruction to anybody at the MCSO to not voluntarily disclose the existence of the IDs to the Monitor. (*See* Doc. 1194 at Tr. 16 ("MS. IAFRATE: [W]e did not lie to the monitors or keep that from the monitors. . . . THE COURT: Well, let me ask you, are you aware that any instruction was given to MCSO that they were not to volunteer that information? MS IAFRATE: No, and any further conversation is privileged."), 29.)

There is probable cause to believe that Chief Deputy Sheridan intentionally violated multiple orders of this Court in not disclosing the 1459 IDs to the Monitor, in suspending the IA investigation into the 1459 IDs, in failing to report the investigation to the Monitor and this Court, and in failing to give the Monitor complete access to IA #2015-511. Accordingly, the Court refers Chief Deputy Sheridan to another Judge of this Court to determine whether he should be held in criminal contempt for concealing the 1459 IDs, and the PSB's investigation into those IDs, from the parties and the Monitor.

2. Captain Steve R. Bailey

Captain Bailey initiated an investigation into the 1459 IDs on July 7, 2015. Within a few days thereafter, he suspended the investigation on the orders of Chief Deputy Sheridan. He never voluntarily disclosed the existence of the 1459 IDs or the IA investigation into them to the Monitor. Suspending the investigation did not change the obligation to disclose it. The MCSO was required to disclose the investigation because it

⁹ By suspending the investigation, he neither closed it nor terminated it. He and Bailey both testified that the investigation would have been re-opened and completed later. Although, even had he closed it, the November 20, 2014 order still required complete disclosure of its opening, conclusions, and closure. (Doc. 1677 ¶ 336.)

1 was an investigation, (Doc. 1677 ¶ 344), it was undertaken, (*id.* ¶ 333), and it was still
2 pending and Bailey intended to complete it when the time was appropriate, (*id.* ¶ 335).
3 Bailey acknowledged in another context that just because investigators had suspended an
4 IA investigation, the investigation still existed and they could not fail to report its
5 existence to the PSB. (*Id.* ¶ 342 n.11.) Such attempts at obfuscation are precisely why
6 the Court had given the Monitor complete access to the investigations to determine,
7 among other things, “the manner in which MCSO pursues an investigation—be it
8 criminal or administrative in nature—the investigation’s initial and continuing scope in
9 light of the information the investigation uncovers, the performance of the investigations,
10 and the kind of discipline—if any—ultimately imposed at its conclusion.” (Doc. 795 at
11 17.)

12 Further, on July 20, 2015, Captain Bailey gave a knowing and false response to
13 the Monitor concerning the existence of the IDs or an investigation into them. There
14 were, as he well knew, 1459 IDs that had been found. There were orders that he knew
15 required him to identify and give the Monitor the documents the Monitor requested. (*See*
16 Doc 606 ¶ 145; Doc. 795 at 20.)

17 Captain Bailey knew the requirements of this Court’s orders when he misstated the
18 facts to the Monitor. (*Id.* ¶ 348; Doc. 1498 at Tr. 3872.) He understood that the MCSO
19 was to comply with the Monitor, (Doc. 1498 at Tr. 3873), he knew on July 20th that he
20 could not unilaterally withhold information from the Monitor, (*id.* at Tr. 3874), and he
21 knew that he had a duty of candor towards the Monitor, (*id.* at Tr. 3874–75).
22 Nevertheless, he gave the untruthful response. Thus, he cannot establish a good faith
23 defense against contempt even assuming that Ms. Iafrate advised him to make such
24 misstatements. Advice of counsel in these circumstances does not constitute a defense to
25 a criminal contempt charge. *See, e.g., Armstrong*, 781 F.2d at 706. Captain Bailey
26 asserts that it can. (Doc. 1750 at 7, 9–10.) While there is evidence to believe that Ms.
27 Iafrate gave him such counsel—his testimony to that effect is supported by Lieutenant
28 Seagraves—Ms. Iafrate denies it, and her statement is at least indirectly supported by

1 Chief Deputy Sheridan's testimony that Iafrate advised Bailey to disclose the IDs if
2 directly asked about them. (Doc. 1465 at Tr. 1356–57).

3 As are all of the other potential contemnors here, Captain Bailey is entitled to a
4 full and fair hearing on this matter. To be sure, he was under the command of Chief
5 Deputy Sheridan. But his intentional misstatements to the Monitor were serious and
6 obstructive acts taken in his capacity as the Captain of the PSB when the MCSO was
7 under a civil rights remedies order that required disclosure. There is little doubt that he
8 made the untrue statements, and little doubt that he knew that it was wrong to do so when
9 he made the statements that he did.

10 If Chief Deputy Sheridan is to be believed, Captain Bailey asked Ms. Iafrate, in
11 their July 17 meeting, what he should do if he was asked a direct question about the IDs,
12 and received the response that he should disclose them. If Ms. Iafrate's statements to the
13 Court are to be believed, she never directed Bailey to hide anything from the Monitor.
14 Further Chief Deputy Sheridan testified that Bailey visited him when the IDs were
15 disclosed and was concerned about the ramifications of his untruthful response to the
16 Monitor. Although Captain Bailey denies all of these assertions, his own positions and
17 testimony have been at least arguably inconsistent on important points. Thus the charges
18 are serious and the evidence of them considerable. They deserve to be the subject of a
19 criminal contempt hearing where Captain Bailey can be fully heard on the matter.
20 Accordingly, the Court refers Captain Bailey to another Judge of this Court to determine
21 whether he should be held in criminal contempt for his intentional misstatements to the
22 Monitor regarding the existence and investigation into the 1459 IDs.

23 **3. Michelle M. Iafrate**

24 When Ms. Iafrate assumed the representation of the Sheriff in this matter, the
25 MCSO was under a decree that required that it disclose information to the Monitor
26 concerning IA investigations that the MCSO undertook, and that the Monitor be given
27 complete access to such investigations. It was required to cooperate fully with the
28 Monitor in his investigations and otherwise, and provide him with all documents he

1 requested. Further, the Court had provided mechanisms for the Sheriff to challenge the
2 right of the Monitor to particular documents or investigations, but required that in doing
3 so the Sheriff identify those documents or investigations.

4 Chief Deputy Sheridan, (Doc. 1465 at Tr. 1355–56), Captain Bailey (Doc. 1498 at
5 Tr. 3868, 3932–34), and Lieutenant Seagraves, (Doc. 1455 at Tr. 2168–69), all testified
6 that Ms. Iafrate told them on July 17 that they should not voluntarily disclose the
7 existence of the 1459 IDs to the Monitor should they come up during the site visit.
8 Captain Bailey and Lieutenant Seagraves further testified that in their July 20, 2015
9 meeting with the Monitor, Ms. Iafrate instructed Captain Bailey to give an untruthful
10 answer to a Monitor’s question about the 1459 IDs. However, Captain Bailey and
11 Lieutenant Seagraves disagree about what the actual question was. Lieutenant Seagraves
12 testified that the question was something to the effect of whether new IDs had been
13 found.¹⁰ (Doc. 1455 at Tr. 2171–74.) Captain Bailey testified that the question was
14 whether there were any pending investigations concerning IDs.¹¹ (Doc. 1498 at Tr.
15 3935–36.)

16 Ms. Iafrate was aware that in response to the above orders and the Monitor’s
17 instruction, (Doc. 606 ¶¶ 145, 147; Doc. 700 at Tr. 71–73; Doc 795 at 20), the Sheriff
18 was obligated to disclose all new IDs found at the MCSO. She personally made such
19 disclosures on behalf of the Sheriff beginning in December 2014. (*See, e.g.*, Doc. 827.)
20 Between this Court’s February 2015 discovery order and July 2015, she apparently made
21 such disclosure to the Monitor at least five times.

22 For the reasons stated above, to the extent Ms. Iafrate advised the MCSO to not
23 disclose the 1459 IDs, she was in violation of this Court’s orders. Advising a client to
24 violate a Court’s orders qualifies as criminal contempt. *Snyder*, 428 F.2d at 523 (“Here,
25 the advice, if given at all was to disobey the court’s order. We have held in such a case

26 ¹⁰ This is consistent with the description of the question made by the Monitor at
27 the Court’s July 24 hearing. (*See* Doc. 1194 at Tr. 7–8.)

28 ¹¹ This is more consistent with the description of the question made by Ms. Iafrate
at the Court’s July 24 hearing. (*See* Doc. 1194 at Tr. 16–17.)

1 that the attorney is also in contempt.”) (citation omitted).

2 Further, according to this Court’s orders, the MCSO could only withhold
3 documents requested by the Monitor based on a claim that they were subject to the
4 attorney-client privilege. (Doc. 606 ¶ 146.) To make such a claim, however, the MCSO
5 was obliged to identify those documents to the parties and the Monitor and then
6 demonstrate why the documents were privileged. (*Id.*) There is no claim that the 1459
7 IDs are privileged. Instructing her clients to misstate the truth about the existence of the
8 IDs not only violated this Court’s orders that the Monitor receive all the documents
9 requested, but also violated the prescribed way in which the MCSO was to dispute the
10 Monitor’s right to access documents.

11 To the extent that she advised MCSO personnel not to voluntarily disclose
12 information to the Monitor, she also violated Court orders that required the PSB to
13 affirmatively disclose its investigations, (Doc. 795 at 18), and provide the Monitor with
14 full access to them, (*id.* at 17–18 (“[T]he Monitor must necessarily have complete access
15 to Defendant’s internal affairs investigations.”); Doc. 825 at 1 (same)).

16 Ms. Iafrate was aware of this Court’s requirement that IA investigations be
17 disclosed by content, subject, and number to the Court at their initiation. She had
18 complied with this requirement a number of times. (*See, e.g.*, Docs. 814, 830, 848, 852,
19 874.) And she personally informed the Monitor of the opening of five new IA
20 investigations involving found IDs at MCSO between this Court’s February 2015 order
21 and July 2015. She was made aware by Captain Bailey that he had opened a new IA
22 investigation with respect to the 1459 IDs. (Doc. 1498 at Tr. 3868.) They were,
23 admittedly, discussing the newest of those investigations, aside from the 1459 IDs, in the
24 July 20, 2015 meeting. (*See, e.g.*, Doc. 1194 at Tr. 16–17.)

25 She also violated the prescribed way in which the MCSO was to dispute the
26 Monitor’s right to oversee any PSB investigation. To appropriately contest the Monitor’s
27 right to have complete access to an IA investigation, the MCSO had to first identify the
28 targets and subject matter of the investigations, and then the MCSO had to demonstrate

1 that the investigation bore no relation to this lawsuit. (Doc. 795 at 21; Doc. 825 at 1–2.)

2 These requirements were set forth in this Court’s November 20, 2014 order. Ms.
3 Iafrate was aware of this Order. When the Court invited objections to it, Ms. Iafrate
4 specifically objected to the provision that the Monitor be given full access to all IA
5 investigations. In response to Ms. Iafrate’s objection, the Court made clear that it would
6 continue to require that the MCSO give the Monitor complete access to all investigations
7 so that the Monitor could independently determine which ones applied to the members of
8 the Plaintiff class or their rights. Nevertheless, the Court modified the order to enhance
9 the Sheriff’s ability to object if the Monitor asserted the right to oversee internal affairs
10 matters that the Sheriff believed to be unrelated to this lawsuit.¹² (Doc. 817 at Tr. 7–9.)
11 Ms. Iafrate indicated that she found this solution acceptable. (*Id.* at Tr. 9.) Her directions
12 to her clients not to disclose such investigations, however, were in violation of this order.

13 Further, Ms. Iafrate’s direction to speak intentional untruths to the Monitor were
14 contemptuous not only because she advised her client to violate this Court’s orders but
15 also because such untruthfulness concealed that violation. Such conduct not only
16 qualifies as contemptuous, *see, e.g., Clark v. United States*, 289 U.S. 1, 11–12 (1933)
17 (“Deceit by an attorney may be punished as a contempt if the deceit is an abuse of the
18 functions of [her] office . . . and that apart from its punishable quality if it had been the
19

20 ¹² In that December 9, 2015 clarification, the Court noted:

21 [T]he ‘Monitor must necessarily have complete access to Defendants’
22 internal affairs investigations.’ . . . Defendants are further authorized
23 to file objections with the Court if and when they dispute the
24 Monitor’s involvement in particular investigative processes as
25 bearing no relation to the Monitor’s evaluation of whether the
26 Professional Standards Bureau is operating in compliance with the
27 Supplemental Permanent Injunction or other Orders of this Court
28 (*e.g.*, Docs. 606, 670), or as otherwise exceeding the power vested in
the Monitor by the Court or unrelated to Plaintiffs claims. In its brief,
Defendants must identify the contested investigation by its assigned
administrative number, and explain the irrelevancy of the Monitor’s
inquiry to the issues and conclusions in the underlying lawsuit.

(Doc. 825 at 1–2.)

1 act of someone else.”), it further violates a number of the Rules of Professional
2 Responsibility to which Ms. Iafrate is bound. L.R.Civ.P. 83.2(2); A.R.S. Sup. Ct. Rules,
3 Rule 42, Rules of Prof. Conduct, E.R. 1.2 (“A lawyer shall not counsel a client to engage,
4 or assist a client in conduct that the lawyer knows is . . . fraudulent.”); E.R. 3.4(a) (“A
5 lawyer shall not . . . unlawfully obstruct another party’s access to evidence or unlawfully
6 . . . conceal a document or other material having potential evidentiary value. A lawyer
7 shall not counsel or assist another person to do such an act.”); E.R. 3.4(c) (“A lawyer
8 shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an
9 open refusal based on an assertion that no valid obligation exists.”); E.R. 4.1 (“In the
10 course of representing a client a lawyer shall not knowingly make a false statement of
11 material fact or law to a third person[.]”); ER 8.4(c)–(d) (“It is professional misconduct
12 for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or
13 misrepresentation; (d) engage in conduct that is prejudicial to the administration of
14 justice[.]”).

15 In addition to the other orders that this Court had issued, there was no reasonable
16 basis for Ms. Iafrate not to provide the 1459 IDs in response to this Court’s February
17 2015 discovery order. (Doc. 881.) But, even if there were such a good faith basis, there
18 is no justification for her instruction to her clients to misrepresent facts to the Monitor in
19 doing so. Further, Ms. Iafrate’s instruction to her client to conceal the IDs and/or the
20 investigation, and to do so dishonestly, strengthens the probable cause to believe that she
21 intended to violate this Court’s orders and to conceal the IDs from the parties, the
22 Monitor, and this Court in response to the request made of her by Chief Deputy Sheridan
23 about whether there was a necessity to disclose the IDs.

24 Ms. Iafrate makes the point that, while still representing the Sheriff in the
25 evidentiary hearing, she was not called by any party to testify concerning this matter and
26 thus had not had an opportunity to be heard. She did of course represent to this Court, in
27 its July 24, 2015 hearing, that she was aware of the 1459 IDs but “we did not lie to
28 monitors or keep that from the monitors.” (Doc. 1194 at Tr. 16.) She further avowed

1 that she was not aware of any instruction given to the MCSO that they were not to
2 volunteer information about the 1459 IDs. (*Id.*) She further represented to this Court that
3 she was in the Monday meeting and that current pending ID investigations were
4 discussed but not the 1459 IDs. (*Id.* at Tr. 16–17.) She, of course, is entitled to be heard.
5 Based on the testimony reviewed above, however, there is probable cause to conclude
6 that Ms. Iafrate was not truthful with this Court or the Monitor. The allegations of
7 misconduct against her are serious and deserve an expeditious resolution.

8 Ms. Iafrate filed briefing suggesting that the appropriate remedy, if any, for her
9 violations of this Court's orders was to refer her to the state bar for discipline. There is
10 probable cause to conclude not only that Ms. Iafrate intentionally advised her client to
11 disobey this Court's orders, but that she advised her client to be untruthful in doing so.
12 There is also probable cause to believe that Ms. Iafrate fully understood this Court's
13 orders and fully intended to assist her client in their violation. These are, if found to be
14 true, serious violations not only of Ms. Iafrate's professional ethical obligations, but of
15 her obligations to this Court to not obstruct its orders designed to discover and remedy
16 harms done to the Plaintiff class. Accordingly, while a referral to the state bar may be
17 appropriate given the facts, it is a separate consideration.

18 The Court, therefore, refers Michele Iafrate to another Judge of this Court to
19 determine whether she should be held in criminal contempt for her actions in failing to
20 disclose the 1459 IDs and/or the investigation concerning them to the Monitor, and
21 directing her client to misstate facts in response to the Monitor's questioning.

22 **II. Conclusion and Assignment to Another Judge**

23 Pursuant to Rule 42(a)(2) of the Federal Rules of Criminal Procedure, the Court
24 requests that the United States Attorney for District of Arizona, John M. Leonardo, or his
25 designee(s), prosecute this matter. If the United States Attorney declines the appointment
26 he should so inform the Judge to whom the criminal contempt matters arising from this
27 case are referred, so that an additional assignment to a prosecuting attorney may be made
28 if that Judge deems it appropriate. Fed. R. Crim. P. 42(a)(2).

1 The Court retains its jurisdiction over this civil case and the resulting continued
2 supervision of the Defendants and directs that only the criminal contempt proceedings
3 initiated by this Order be randomly assigned to another Judge within the District of
4 Arizona.

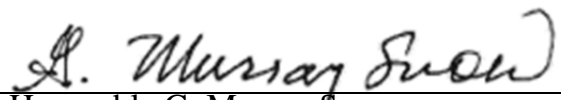
5 In light of this Court's referral, the assigned Judge shall determine and state to the
6 Defendants the time and place of the trial, and allow the Defendants a reasonable time to
7 prepare a defense pursuant to Rule 42(a).

8 **IT IS THEREFORE ORDERED** that pursuant to Rule 42(a)(1) of the Federal
9 Rules of Criminal Procedure, the Court refers Sheriff Joseph M. Arpaio, Chief Deputy
10 Gerard Sheridan, Captain Steven R. Bailey, and Attorney Michelle M. Iafrate to another
11 Judge of this Court to determine whether they should be held in criminal contempt for the
12 matters detailed above.

13 **IT IS FURTHER ORDERED** directing the Clerk of Court to refer the criminal
14 contempt proceedings, by random lot, to another Judge in the District of Arizona.

15 **IT IS FURTHER ORDERED** directing the Clerk of Court to promptly notify the
16 United States Attorney for the District of Arizona regarding this Order.

17 Dated this 19th day of August, 2016.

18 
19 _____
20 Honorable G. Murray Snow
21 United States District Judge
22
23
24
25
26
27
28